HALIZA ABDUL HAMID v. ZALINA MOHD FADZIL

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[ORIGINATING SUMMONS NO: 24NCVC-437-07-2015]
29 DECEMBER 2015

CIVIL PROCEDURE: *Appeal – Notice of appeal – Extension of time to file – Application for – Delay of almost four months – Discretion of court to grant extension of time – Whether applicant provided satisfactory explanation for delay – Admissibility of fresh evidence – Whether available during trial – Whether applicant complied with Magistrate's directions – Whether defendant would be prejudiced if extension allowed – Rules of Court 2012, O. 3 r. 5, O. 55 r. 5(2) & O. 56 r. 1(3A)*

This was the applicant's application ('encl. 1') for leave of court under O. 3 r. 5 of the Rules of Court 2012 ('ROC') to extend time for filing of the notice of appeal against the decision of the learned Magistrate in granting summary judgment against the applicant (the defendant in the original action). The application was made on 5 July 2015, *ie*, some six months after the summary judgment was granted. The facts revealed that the applicant engaged the defendant (the plaintiffs in the original action) to undertake home renovation works at a total cost of RM92,400. Disputes arose when the applicant failed to settle the outstanding balance of RM87,400 which was due to the defendant. As a result, the defendant filed an action in the Magistrate's Court and on 12 January 2015, the defendant obtained summary judgment against the applicant. The applicant wanted to file an appeal to the High Court and in accordance with O. 55 r. 5(2) of the ROC 2012, the deadline for filing the notice of appeal was on 26 January 2015. However, the applicant did not file the notice during the said period. Hence, these proceedings *vide* encl. 1. The applicant contended that (i) she was working in London and due to the distance, she was not able to contact her lawyer to provide the necessary instructions nor could her lawyer get in touch with her; (ii) she was suffering from hypertension and had continual health problems since 2012 which complicated her efforts to communicate with her lawyers; (iii) the intended appeal had merits since the defendant failed to fully complete the renovation works and did not perform his duties as agreed; and (iv) the defendant would not be prejudiced if encl. 1 was allowed since the latter had yet to commence any enforcement or execution proceedings against her. The applicant submitted that she was only able to give instructions for her lawyer to file an appeal when she returned to the country on 20 March 2015. The defendant, however, alleged that the applicant did not comply with the Magistrate's directions to file an affidavit in reply in relation to the application for summary judgment. This, as alleged, demonstrated that the applicant paid scant regard for the rules and directions of the courts.

Held (dismissing encl. 1 with costs):

(1) The court will look at the circumstances of the case in its consideration to exercise its discretion to extend time. On the facts, there was an absence of a satisfactory explanation as to why the notice of appeal could not be filed immediately once the applicant was back in Malaysia. Instead, the notice was filed almost four months thereafter. The applicant's grounds pertaining to the alleged difficulty in communicating with her lawyers due to the distance, time difference as well as her medical situation could only, if at all, be of relevance to the period of time prior to her return on 20 March 2015. Distance was hardly relevant in this current age of information technology which offers a variety of communication options. (paras 14, 17, 18 & 19)

(2) The applicant resided in London, one of the most developed and sophisticated cities in the world. Since she was working as a clerk at an embassy, she would have been exposed to the marvel of modern day communication techniques. Further, the time difference of eight hours was a non-issue. If the applicant felt that she ought to speak directly with her lawyer, the applicant could arrange for calls to be made around lunchtime GMT. In the circumstances, the reasons relating to time difference and distance, considering the circumstances, was plainly not tenable, almost bordering on stretching credulity to the limit and manifestly unacceptable. (paras 20 & 21)

(3) The applicant's argument in relation to her health condition was not sufficiently supported by evidence. There was a total absence of even a semblance of an explanation as to how and to what extent the applicant's particular ailment affected her daily life, activities and routine. There was no evidence, *inter alia*, to show that the applicant had been admitted in hospital. There was also a total absence of any form of evidence of medical observation by any doctor practicing in the UK where the applicant lived during the relevant period the notice of appeal ought to have been filed. If the applicant's condition was sufficiently serious to have prevented her from finding only a few minutes to make contact with her lawyer, surely there ought to be some real evidence of visits made to clinics or any form of interaction with a medical practitioner in the UK to indicate what had actually happened to her during the period to enable the court to better appreciate her situation. However, there was none. (paras 22 & 23)

(4) The absence of any evidence to show how the ailment affected the applicant raised doubts on whether it could be deemed to be serious. Further, the applicant breached the directions of the Magistrate to have ensured that an affidavit in reply was filed to challenge the averments in the defendant's affidavit in support in relation to the summary judgment application. The applicant did not offer any explanation for the non-compliance. Further, the applicant's counsel did not submit on

whether there was strong legal basis to raise matters which were not previously made available by way of affidavit before the Magistrate's Court. (paras 25-27)

(5) If reference was made to O. 56 r. 1(3A) of the ROC on admissibility of fresh evidence during the hearing of an appeal, the applicant would have failed the twin test of demonstrating that (i) the evidence would not have been obtainable at the trial even where reasonable diligence was exercised by the evidence gatherer; and (ii) the evidence would likely have a determining influence on the decision at the first instance. Both conditions must be satisfied for they are cumulative and to be read conjunctively. On the facts, the applicant failed to at least pass the reasonable diligence test, given the fact and more so in respect of the evidence which ought to have been readily available then (*Lee Thye v. Societe Generale Cawangan Singapore*; refd). (para 27)

(6) The primary consideration when exercising discretion to extend time was whether the party could clearly demonstrate that there was no intention to ignore or flout the order and that failure to obey was due to extraneous circumstances. The reasons put forth for the substantial delay was unacceptable, such that it would not be a proper exercise of judicial discretion to grant extension of time. Further, the chances of success on appeal were doubtful and prejudice would be occasioned to the defendant if extension was granted in that the proceedings continue uncompleted and the enjoyment of the fruits of the litigation denied, even if potentially only temporarily. Considering all the circumstances of this instant application, neither would an extension be in the interest or further the cause of justice. (paras 29 & 34)

(7) The defendant could similarly argue that her interest would be prejudiced should enlargement of time be allowed considering that the judgment had already been pronounced some six months earlier before an application for extension was made by the applicant on the strength of the grounds that could not be characterised other than spurious. During the said period, the defendant had reasonably assumed that final judgment had been obtained and the right to enforce the same was available to her in order to enjoy the proverbial fruits of litigation. This case was not one where there was no prejudice caused to the defendant and it was also not a defensible exercise of judicial discretion for this court to rule that the prejudice could be adequately compensated by costs. (para 36)

Case(s) referred to:

Bank Utama (Malaysia) Bhd v. Sistem Bis Komputer Sdn Bhd & Ors [1994] 4 CLJ 347 HC ***(refd)***

Cheah Teong Tat v. Ho Gee Seng & Ors [1972] 1 LNS 16 HC ***(refd)***

Cosway (M) Sdn Bhd v. Gan Poh Im [2000] 1 LNS 217 HC ***(refd)***

Development & Commercial Bank Bhd v. Tan Ong Hwa & Anor [1992] 2 MLJ 764 ***(refd)***

Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lee Thye v. Societe Generale Cawangan Singapura [2010] 1 CLJ 170 CA ***(refd)***
Mohamed Suboh v. Devadas [1980] 1 LNS 201 FC ***(refd)***
Nadarajan Verayan v. Hong Tuan Teck (No 2) [2008] 1 CLJ 798 HC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Ong Guan Teck & Ors v. Hijjas Kasturi [1982] CLJ 31; [1982] CLJ (Rep) 616 HC ***(refd)***
Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 HC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 3 CLJ 114 HC ***(refd)***
Sivakumar Varatharaju Naidu v. Ganesan Retanam [2010] 9 CLJ 825 CA ***(refd)***
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [1998] 4 CLJ 883 CA ***(refd)***
Veerasingham v. PP [1957] 1 LNS 93 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 3 r. 5, O. 55 r. 5(2), O. 56 r. 1(3A), O. 92 r. 4

For the applicant - Saidah; M/s Kamal Hisham & Assocs
For the defendant - Nur Aini; M/s Thara Singh Sidhu & Kushvinder

Reported by Kumitha Abd Majid

JUDGMENT

Mohd Nazlan Ghazali PK:

Introduction

[1] This is an application (encl. 1) by the applicant (the defendant in the court below) for leave of court under O. 3 r. 5 of the Rules of Court 2012 ("RC 2012") to extend time for the filing of the notice of appeal against the decision of the Magistrate granting summary judgment against the applicant (the defendant in the original action).

Key Background Facts

[2] The applicant engaged the defendant to undertake home renovation works for the former at an agreed total cost of RM92,400. It is the case of the defendant that despite having completed the works and notwithstanding the applicant and her family having moved back into the premises, the applicant had failed to pay the balance of RM87,400 due to the defendant.

[3] Despite repeated requests and reminders, the applicant refused to make the requisite payment to the defendant. The notice of demand dated 6 May 2014 too went unheeded, resulting in the filing of an action to claim the outstanding amount, and on 12 January 2015, the defendant obtained summary judgment against the applicant. The deadline for the filing of the notice of appeal was on 26 January 2015 in accordance with O. 55 r. 5(2) of the Rules of Court 2012. The applicant did not file any during the period. Hence, these proceedings.

The Grounds Supporting The Application

[4] The present application for the extension of time was made on 5 July 2015, some six months after the granting of summary judgment against the applicant.

[5] There are two principal grounds relied on by the applicant in support of her application for extension of time. The first is that the applicant was not able to contact her lawyers to give the necessary instructions, and nor could her lawyer get in touch with her given that she was working at the Brunei High Commission in London, making communication with her lawyers difficult due to the distance and time difference.

[6] Secondly, the applicant claimed that she was suffering from hypertension and had continual health problem since 2012, including having to take a number of days off on medical grounds, further complicating her efforts to communicate with her lawyers, more so as she is a single mother and handles this case entirely on her own. The applicant was thus only able to give instructions for her lawyer to file an appeal when she was back in the country on 20 March 2015.

[7] A notice of motion to apply for leave to file an appeal out of time was pursued expeditiously but in light of some confusion over the nature of the document for the relevant proceedings, an originating summons was then filed on 7 May 2015, only to be withdrawn on 25 June 2015 due to typographical errors which were wholly inadvertent. The amended originating summons was subsequently properly filed.

[8] The applicant further contended that the intended appeal has merits as the defendant had failed to fully complete the promised renovation works and did not perform as agreed, resulting in losses to the applicant, given the need to rectify the defects occasioned by the defendant. The costs to rectify and fully complete the requisite renovation works amounted to RM31,800, and the applicant is therefore fully entitled to effect a set off of the said amount against the sum claimed by the defendant.

[9] The applicant additionally submitted that an order of the court allowing the applicant to file an appeal out of time would not prejudice the defendant, especially give that the latter had also not yet commenced any enforcement or execution proceedings following the summary judgment granted in favour of the defendant on 12 January 2015.

The Submission By The Defendant Opposing The Application

[10] The defendant on the other hand, contended quite straightforwardly that the grounds put forth by the applicant are devoid of merit. First, it was contended that the applicant had in non-adherence to the direction of the Magistrate's Court failed to file an affidavit in reply to the application for summary judgment which was subsequently granted, suggesting that the

applicant paid scant regard for the rules and directions of courts, which is now demonstrated yet again in her failure to file an appeal against the decision of the Magistrate within the prescribed time limit.

[11] The reasons concerning the applicant working and residing in London should not be accepted in light of the ready availability of various options such as the email and social media as alternative and extensively used modes of communication. Nor is the applicant's assertion of being unwell corroborated or supported by clear and specific specialist medical report. The applicant submitted a support letter from a clinic in Kulai, claiming generally that this doctor had been treating the applicant since 2012. The production of MC chits too did not disclose other than medical leave of one or at most only two days.

[12] The defendant denied non-completion of the renovation works, contending that the applicant did not raise any complaints even after having moved back into the house, during the six-month defect liability period. The allegation of rectification works requiring the applicant to expend RM31,800 is supported only by an invoice, not receipt or proof of payment. More significantly, the applicant's attempt at having the outstanding RM83,600 set off by such amount is legally improper since the matter was never pleaded in the applicant's defence in the proceedings before the Magistrate's Court. It would also tantamount to an introduction of a new evidence at an appeal stage when the applicant had clearly failed not only to plead in her defence but also to file an affidavit in reply for such purpose, despite having been directed by the Magistrate's Court to do so. The application for extension of time would thus prejudice the defendant for it would preclude the latter enjoying the fruits of litigation. I shall now turn to the law governing the application.

The Applicable Law

[13] Order 3 r. 5 of the RC 2012 on extension of time reads as follows:

> **Extension of time (O. 3 r. 5)**
>
> 5. (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> (3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent in writing without an order of the Court being made for that purpose.

[14] The court will look at the circumstances of the case in its consideration to exercise its discretion to extend time. The following passage from the short judgment of Thomson CJ in *Veerasingham v. PP* [1957] 1 LNS 93; [1958] MLJ 76 on judicial discretion was quoted with approval by the Federal Court in *Mohamed Suboh v. Devadas* [1980] 1 LNS 201; [1981] 1 MLJ 136:

> Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent.

[15] In *Hj Mohamed Suboh*, the Federal Court agreed with the High Court that no sufficient ground had been advanced for the delay of close to three weeks for the service of the memorandum and record of appeal.

[16] In *Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 3 CLJ 114; [1994] 2 MLJ 424 the High Court set out a guiding framework of four criteria to be considered in situations involving extension of time to file an appeal, as follows:

> The grant of extension of time to appeal is a matter of discretion for the court. The following are normally to be considered:
>
> (1) the length of the delay;
>
> (2) the reasons for the delay;
>
> (3) the chances of the appeal succeeding if time for appealing is extended; and
>
> (4) the degree of prejudice to the potential respondent if the application is granted.
>
> These factors are merely a framework or guide for the purpose of exercising the discretion and are not intended to be rigid mandatory requirements. It is not necessary that all the four factors must be in favour of an applicant in order that the discretion may be exercised to the applicant's benefit ...

In that case, the delay of 18 months, despite being considerable, had been found to be reasonably explained and also shown to be connected to steps taken in relation to the decision of the Senior Assistant Registrar intended to be appealed against.

Evaluation And Findings By The Court

[17] The defendant contended that the delay in question, which was for about six months, is substantial. The applicant however was less explicit in stating when exactly the first attempt was made to apply for an extension of time since her return on 20 March 2015 which was slightly less than two months after the expiry of the time limit for the filing of the notice of appeal. There is an absence of a satisfactory explanation as to why the said notice could not have been filed immediately upon the applicant being back in Malaysia in March 2015, but instead only done in July 2015, almost four months thereafter. The applicant made some vague averments on the confusion of the nature of the document to be used and the subsequent typographical errors in the originating summons which then further led to the withdrawal of the same. If it is suggested (which is not) that there was a mistake on the part of her lawyers in handling the matter, I need only refer to the following passage from the judgment of the High Court in *Cosway (M) Sdn Bhd & Anor v. Gan Poh Im* [2000] 1 LNS 217; [2000] 4 MLJ 517 which reads:

> Further, in the exercise of its discretionary power, it has been authoritatively laid down that ignorance of procedural law does not constitute sufficient material upon which the court could exercise its discretion to enlarge time where an appellant has failed to file it within the time prescribed by the rules (see Supreme Court decision in *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 109).
>
> It is also necessary to show special circumstances to enable the court to exercise its discretion. It is not enough to show that the appeal had merits.
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> As to what constitute 'special' grounds, in the case of *CheahTeong Tat v. Ho Gee Seng & Ors* [1974] 1 MLJ 31 Syed Agil Barakbah J (as His Lordship then was), in facing a similar question, besides holding that the mere fact of misunderstanding of the rules is not a special circumstance as to induce the court to give leave to extend time, also gave some instances which could be considered as 'special' circumstances in the granting of an extension of time, ie where the applicant 'has been misled by the other side, or where some mistake has been made in the registry itself and he was misled by an officer of the court or where delay in filing notice has been caused by unforeseen circumstances like sudden death or inevitable accident or sudden serious illness or something of that kind which reasonably account for the delay.

[18] The applicant's grounds pertaining to the alleged difficulty in communicating with her lawyers due to distance and time difference, as well as given her medical situation could only (if at all) be of relevance to the period of time prior to her return on 20 March 2015.

[19] Having considered the circumstances of the grounds raised by the applicant, I have no hesitation in arriving at the view that the reasons proffered by the applicant pertaining to distance and time difference to be mere excuses which are unsatisfactory, unreasonable and thus not acceptable.

Distance is hardly relevant in this current age of information technology which now offers a variety of communication options. If contacting by telephone or facsimile transmission was not possible (even this is questionable), the applicant could have resorted to short messaging system or the various social media avenues, not to mention *via* electronic mail. In fact the affidavit by the defendant (encl. 3) averred that it was due to an email sent to the yahoo email address of the applicant that had led to the latter instructing her lawyers to respond to the earlier action filed by the former. This was not denied by the applicant in her subsequent affidavit in reply (encl. 4). Thus the rule enunciated by the Court of Appeal in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 applies and that part of the affidavit of the defendants is deemed admitted.

[20] The applicant was residing in London, one of the most developed and sophisticated cities in the world, and working as a clerk at an embassy, which surely must have exposed the applicant to the marvel of modern day communication techniques. Further, time difference of eight hours is surely a non-issue. If the applicant felt that she ought to speak directly with her lawyers (for other electronically transmitted messages would render the time difference argument devoid of logic as the recipient could read the messages whenever he deems convenient), the applicant could arrange for calls be made around lunch time GMT. This would conveniently translate to the local time in Malaysia to be after 8pm (disregarding the one additional hour during British Summer Time from end March to end October).

[21] I therefore find the reasons relating to time difference and distance, considering the circumstances, plainly not tenable, almost bordering on stretching credulity to the limit and manifestly unacceptable.

[22] The applicant's argument concerning her health condition is however not sufficiently supported by evidence. Even though Poliklinik Murni did state apart from hypertension (which is manifestly becoming if not already is a common ailment afflicting a not insignificant size of the adult population generally) that the applicant is suffering from "cerebrovascular accident", this was never elaborated on or even mentioned in any averments of the applicant in her two affidavits. It is only in the written submission that this was identified simply as "stroke", and nothing more.

[23] However, there is still a total absence of even a semblance of an explanation as to how and to what extent this particular ailment affects the daily life, activities and routine of the applicant. There is no evidence of the applicant having been admitted to hospital, nor any medical leave for more than even two days during the material time. There was also a total absence of any form of evidence of medical observation by any doctor practising in the UK where the applicant lived during the relevant period the notice of appeal ought to have been filed. If the conditions were sufficiently serious to have prevented the applicant from finding only a few minutes to make contact with her lawyer, surely there ought to be some real evidence of visits

made to clinics or any form of interaction with a medical practitioner in the UK to indicate what had actually happened to her during the period to enable the court to better appreciate her situation then. But there is none.

[24] The applicant further relies on the case of *Cheah Teong Tat v. Ho Gee Seng & Ors* [1972] 1 LNS 16; [1974] 1 MLJ 31, particularly on the following part of the judgment:

> Special circumstances, to my mind, include instances where the applicant has been misled by the other side or where some mistake has been made in the registry itself and he was misled by an officer of the court or where delay in filing notice has been caused by unforeseen circumstances like sudden death or inevitable accident or **sudden serious illness** or something of that kind which reasonably account for the delay. Under any of these circumstances, extension of time may be allowed. (per Farwell LJ in *In Re Coles and Ravenshear*, *supra*). The mere fact of misunderstanding of the rules is not such a special circumstance as to induce the court to give leave to extend the time to file notice of appeal.
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> (emphasis added)

[25] In my evaluation, however, none of the circumstances identified in that case can be said to be present in the instant case. There is simply no evidence to support any such finding. The applicant's reliance in particular on "sudden serious illness" is also an assertion that is difficult to sustain. In the first place, the applicant is contending that the illness has afflicted her at least since 2012. This does away with the element of it being "sudden" during the material time when the notice of appeal was supposed to have been filed. Secondly, the absence of any evidence to show how the ailment had affected the applicant (where only evidence of medical leave forms for one or two days being made available) raises doubt on whether it could be deemed to be "serious". Reliance on *Development & Commercial Bank Bhd v. Tan Ong Hwa & Anor* [1992] 2 MLJ 764 is in my view, similarly misconceived for enlargement in that case was allowed partly because the delay was only for seven days.

[26] Nor do I find the contention of the applicant that her appeal, if allowed to be filed out of time is of merit and has a good chance of success to be of substance. The applicant was represented in the summary judgment proceedings. Counsel for the applicant did make submission on her behalf. But the applicant failed in breach of the directions by the Magistrate's Court to have ensured that an affidavit in reply was filed to challenge the averments in the affidavit in support affirmed by the defendant seeking summary judgment. No reasons were offered by the applicant to explain the non-compliance.

[27] Neither is there any submission by counsel for the applicant on whether there is strong legal basis to now raise the matters not previously made available by way of affidavit before the Magistrate's Court. If reference is made to O. 56 r. 1(3A) on admissibility of fresh evidence at appeal hearing

(*albeit* concerning appeals from decisions of Registrar to the judge in chambers) the applicant would in my assessment have failed the twin tests of demonstrating first, the evidence would not have been obtainable at the trial even where reasonable diligence is exercised by the evidence-gatherer and secondly, the evidence would likely have a determining influence on the decision at the first instance (see *Ladd v. Marshall* [1954] 3 All ER 745 and *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399; [1996] 5 MLJ 241). Both conditions must be satisfied for they are cumulative and to be read conjunctively (see *Lee Thye v. Societe Generale Cawangan Singapura* [2010] 1 CLJ 170; [2009] 6 MLJ 24). In the instant case, it is quite clear from the circumstances alluded to earlier, that the applicant flatly failed at least to pass the reasonable diligence test, given the facts, and more so in respect of evidence which ought to have been readily available then.

[28] In addition, the applicant's attempt to suggest a set off is also of little substance and legally objectionable given the trite principle that parties are bound by their pleadings and that the trial is confined only to the pleadings (see *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629). In addition, the rule embodied in O. 18 r. 7(1) makes it clear that every pleading shall contain material facts of which a claim for set off must, considering the circumstances of the instant case, surely be. Failure to plead will thus render the pleading defective and cannot be made good by affidavit evidence (see *Sivakumar Varatharaju Naidu v. Ganesan Retanam* [2010] 9 CLJ 825; [2011] 6 MLJ 70).

[29] It is true, as stated earlier, that the court must consider all the circumstances of the case. However, the Court of Appeal in *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [1998] 4 CLJ 883; [1998] 4 MLJ 297 made it clear that the primary consideration to consider when exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that failure to obey was due to extraneous circumstances. At discussed earlier, it certainly cannot be said that extraneous circumstances were at play in the instant case and the considerable delay and the reasons advanced to try justify the same did little to alter the finding that the applicant was not serious or earnest in ensuring compliance, and the absence of any intention to disregard cannot be reasonably established.

[30] In my view the situation in the instant case is not dissimilar to that found in *Nadarajan Verayan v. Hong Tuan Teck (No 2)* [2008] 1 CLJ 798; [2008] 1 MLJ 436. The delay of 17 days in the filing of a notice of appeal pursuant to the Legal Profession Act 1976 against the decision of the Disciplinary Board was held to be substantial. The application was thus refused since the applicant had at all material times knowledge of the disciplinary proceedings against him but had refused to attend the same. The High Court ruled that the delay was not due to mere oversight or inadvertence but instead attributed the same to the "could not care less" attitude of the applicant.

[31] The crucial importance of strictly adhering to time limits prescribed by the rule cannot be emphasised enough, and in my view the law should be stated such that for applications like the present, whilst all circumstances ought certainly to be considered, failure to provide a satisfactory and reasonable explanation for a delay that cannot be characterised as anything other than substantial should invariably be ruled to be fatal, resulting in the denial of the application absent truly compelling and exceptional grounds to justify the exercise of discretion granting extension instead. This should hold true not just in respect of an extension application under O. 3 r. 5 but also under the inherent powers pursuant to O. 92 r. 4 as well as pursuant to Item 8 of the Schedule to the Courts of Judicature Act 1964.

[32] If, despite the absence of any satisfactory clarification for the delay, undue emphasis is given to the merits of the appeal and consideration of no prejudice against the respondent, the rationale for the imposition of the rules on time limit would soon be brought into open question, at the same opening the floodgates on such line of argument being unwittingly encouraged, thus disrupting the judicious but fine balance between achieving procedural compliance and meting substantive justice. Indeed, support for this proposition can be found in case law authorities. In *Ong Guan Teck & Ors v. Hijjas Kasturi* [1982] CLJ 31; [1982] CLJ (Rep) 616; [1982] 1 MLJ 105, Hashim Yeop A Sani J (as he then was) most instructively held as follows:

> In practice, an application to extend time is generally allowed provided no injustice is caused and the other party can be compensated by costs. However, there must always be before the court cogent material to satisfactorily explain the delay before the court will exercise its discretion to extend time: *Thamboo Ratnam v. Thamboo Cumarasamy & Anor* [1965] 1 WLR 8. Thus, when an applicant failed to advance any reason as to why the writ was not served during the period of its validity, the court would not readily exercise its discretion in favour of extending time to renew the writ: *Lloyd Triestino Societa v. Chocolate Products (M) Sdn Bhd* [1976] 2 MLJ 27, FC. From the authorities both foreign and local, two distinct principles can be garnered. The first principle is the time honoured principle that the rules of court and the associated rules of practice, devised by the Rules Committee and developed by the courts over the years to promote the expeditious despatch of litigation, must be rigidly observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto. This time honoured principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit. Thus, O. 19 r. 1 of the RHC (default in service of statement of claim), O. 24 r. 16(1) of the RHC (failure to comply with requirement for discovery etc), O 25 r. 1(4) of the RHC (failure of plaintiff to take out summons for directions, then the defendant may apply to dismiss the action), O. 28 r 10(1) of the RHC (failure to prosecute proceedings with despatch), and O. 34 r. 2(2) of the RHC (failure of the plaintiff to set down action for trial, the defendant may set down the action for trial or may apply to the

court to dismiss the action for want of prosecution) are some examples set by the Rules Committee. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.

The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is clearly reflected in the general discretion to extend time conferred by O. 3 r. 5(1) of the RHC as reproduced earlier on, and this discretion is to be exercised in accordance with the requirements of justice in the particular case. Broadly stated this principle is also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.

[33] This case was followed in *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399; [1996] 5 MLJ 241 where Abdul Malik Ishak J (as he then was) made the following observations:

In my judgment, these two principles expounded earlier are not absolute. If the first principle were rigidly and vigorously enforced, procedural default would lead to dismissal of actions without any considerations of whether the plaintiff's default had caused prejudice to the defendant. But the court's approach and practice has been and it will continue to be so in that it would treat the existence of such prejudice as a crucial, and often a decisive, matter. On the other hand, if the second principle were followed rigidly without exception, a wealthy plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would not suffer any penalty until and unless the defendant could demonstrate the presence of prejudice. And if this happens it would certainly circumscribe the very general discretion conferred by O. 3 r. 5 of the RHC; indeed it would involve a substantial rewriting of the rule to the dislike of the Rules Committee.

[34] In my evaluation, in the instant case the weight of the first principle (adherence to time limit) far overwhelms the basis of the second principle (any prejudice to be compensated by costs). Far from having the attribute of being cogent, the reasons put forth for the substantial delay were absolutely unacceptable, such that it would not be a proper exercise of judicial discretion to grant extension of time. In addition, the chances of success on appeal are doubtful and prejudice would be occasioned to the defendant if extension is granted in that the proceedings continue uncompleted and the enjoyment of the fruits of the litigation denied, even if potentially only temporarily. Considering all the circumstances of this instant application, neither would an extension be in the interest or further the cause of justice.

[35] In the case of *Bank Utama (Malaysia) Bhd v. Sistem Bis Komputer Sdn Bhd & Ors* [1994] 4 CLJ 347; [1994] 3 MLJ 452 it was held that a one and a half year delay in making an application for an extension of time was unreasonable as it would seriously prejudice the opposite party. James Foong J (as he then was) ruled as follows:

A When a court of law considers such application of this nature the facts and circumstances relating to both the delay in filing the notice of appeal and the application for enlargement of time must be taken into account and the principles as stated in the *D & C Bank* should be considered equally in both situations and as a whole. This would mean that this court should also consider the length of and reason for the delay in filing the B application for enlargement of time in this case and, whether this lateness in application would prejudice the respondent.

Though no time limit is specified in the Rules or by any statute for the filing of an application for the enlargement of time to file a notice of appeal, by natural justice such application should be made within C reasonable time. What is reasonable would depend on the circumstances. A notice of appeal may be filed two days late, but in law it is still a defective notice. What is essential then is for the party concerned to take immediate steps to file an application for enlargement of time to file the notice of appeal out of time. The longer the delay in the filing of an application of such a nature, the greater is the likelihood of prejudice to D the opposite party.

[36] In the instant case, the defendant, being the plaintiff in the original action at the Magistrate's Court can similarly argue that her interest would be prejudiced should enlargement of time be allowed considering that the judgment had already been pronounced some six months earlier before an E application for extension is made by the applicant on the strength of the grounds that cannot be characterised other than spurious. During the said period, the defendant had reasonably assumed that final judgment had been obtained, and the right to enforce the same available to her in order to enjoy the proverbial fruits of litigation. At the hearing before me, counsel for the F defendants highlighted that no execution action had commenced since the defendants were waiting for settlement efforts by the applicant. Now, the defendant is at risk of having to continue to pursue her claim and resist the appeal if the extension is allowed. More so, the summary judgment had been obtained at least in part due to the failure on the part of the applicant to file G an affidavit in reply in violation of directions given by the Magistrate's Court, which explanation for the dereliction until presently is neither forthcoming nor offered. In the circumstances, I find that the case is not one where there is no prejudice to the defendant, and that it is also not a defensible exercise of judicial discretion on my part to rule that the prejudice can be adequately compensated by cost.

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Conclusion

[37] In view of the foregoing, and on the basis of the reasons I have discussed, it is my ruling that the applicant has failed to establish a case to justify the court extending time to allow the filing of the notice of appeal. I Accordingly, encl. 1 is dismissed with costs of RM1,500.